September 11, 2017

Via Electronic Mail

Ms. Constance Courtney Westfall
Strasburger & Price, LLP
720 Brazos Street, Suite 700
Austin, TX 78701

RE: Delta Shipyard Superfund Site

Dear Connie:

Thank you for your memoranda dated March 21, 2017 and June 5, 2017 stating the position of your client, Chromalloy American, LLC (Chromalloy). After reviewing your client's position that the Environmental Protection Agency (EPA) does not have jurisdiction under CERCLA to remediate the Delta Shipyard Superfund Site, as stated in our phone conversation August 29, 2017, the EPA respectfully disagrees.

Analysis of the definition of hazardous substances under CERCLA Section 101(14)

Section 101(14) of CERCLA defines a hazardous substance as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Your client has asserted that subsection (C) of CERCLA section 101(14), 42 U.S.C. § 9601(14)(C), completely excludes wastes which are exempted from regulation under the Resource Conservation and Recovery Act (RCRA), such as Exploration and Production Wastes (E&P Wastes), from the definition of hazardous substances. Based on the assertion that such RCRA-exempt wastes cannot be CERCLA hazardous substances, your client asserts that the EPA does not have jurisdiction to remediate the Site under CERCLA. This assertion directly conflicts with case law interpreting CERCLA section 101(14)(C). Other than the *Center for Biological Diversity v. BP America (In re Oil Spill by the Oil Rig "Deepwater Horizon"*), 2015 U.S. Dist. LEXIS 125358 (E.D. La. 2015), courts consistently have interpreted the exclusion from the definition of hazardous substances contained in subsection (C) as applying only to the specific subparagraph.

Eagle-Picher Industries, Inc. v. United States, 759 F.2d 922 (D.C. Cir. 1985), dealt with the issue of whether mining wastes and fly ash are hazardous substances within the meaning of CERCLA section 104. The petitioners cited the exception contained in subsection C of section 101(14), arguing that it operated to exclude the materials in question from the definition of hazardous substances and that the materials therefore were not subject to regulation under CERCLA. The Court responded that the "argument suffers from a mortal flaw, namely that [the]…interpretation does not comport with the plain meaning of the statute." Id. At 927.

The Court explained that

> The exception for mining wastes and fly ash is found only in a parenthetical clause in subparagraph (C). The ordinary, straightforward reading of that exception is that it applies only to subparagraph (C), not to any of the other five subparagraphs. Had Congress intended to exempt mining wastes and fly ash from the entirety of section 101(14), it obviously could have placed the exemption at the beginning or end of the section, not in one of the several subparagraphs. Indeed, this is precisely what Congress did do with respect to other specific substances.
>
> The draftsman would not, in the face of general exceptions, have relegated a purported general exception to the odd location of a parenthetical provision in a solitary subclause. Id. At 927-29.

The Court specifically concluded that the "exception set forth in section 101(14) does not prevent a substance from being labelled a hazardous substance if it falls within another subparagraph of section 101(14)." Id. at 930.

Several others cases are dispositive on the subject. See *United States v. Metate Asbestos Corp.,* 584 F. Supp. 1143 (D. Ariz. 1984); *T&E Industries, Inc. v. Safety Light Corp.,* 680 F. Supp. 696 (D. N.J. 1988); *Idaho v. Hanna Mining,* 699 F. Supp. 827, 833 (D. Idaho 1987).

Thus, it is well settled that any substance which is exempt from regulation under RCRA by Act of Congress nonetheless may be treated as a hazardous substance for the purposes of CERCLA if it is listed as a hazardous substance pursuant to the authority of the laws referenced in any of the other subsections of section 101(14).

Although all of the above cases dealt with the mining waste exclusion from RCRA regulation, the reasoning in those cases is not restricted to mining wastes, and the cases are instructive in the context of oil exploration and production wastes. First, the courts have relied on traditional rules of statutory construction in determining that the six subsections of section 101(14) operate independently of each other and that the exclusion contained within subsection (C) cannot plausibly be read as creating a total exemption from CERCLA authority for any substance by virtue of that subsection's operation. Second, the courts have consistently noted that the exclusion in subsection (C)'s parenthetical applies to "any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6921 et. seq.] has been suspended by Act of Congress". The exclusion is not confined to mining and mill wastes, and the cases construing the exclusion should not be narrowly read as applying only to mining and mill wastes.

It is the Agency's position that, while oil and gas development and exploration wastes are exempt for the most part from regulation under RCRA, and therefore are not hazardous substances for the purposes of subsection (C) of section 101(14), constituents of such wastes nonetheless can be

considered hazardous substances for the purposes of CERCLA regulation. The constituents of oil and gas exploration and production wastes can be hazardous substances under CERCLA if they fall within the ambit of one of the remaining five subsections of section 101(14). This position is fully supported both by the weight of judicial opinion interpreting CERCLA section 101(14) (C), and by EPA's regulatory determination for oil and gas exploration and production wastes. Thus, Chromalloy may be liable under section 107(a) of CERCLA for the disposal of oil and gas development and exploration wastes containing hazardous substances.

All of the constituents found at the Site, listed in Michael Pisani's June 5, 2017 memorandum to Bill Mahley: Anthracene, Antimony, Arsenic, Benzene, Cadmium, Chromium, Ethylbenzene, Fluorene, Lead, Manganese, Mercury, 2-methyl-naphthalene, Naphthalene, Phenanthrene, Pyrene, O-xylene, M-xylene, P-xylene, and Zinc, are listed hazardous substance under section 101(14)(A) and (B), 40 C.F.R. 302.4. Other constituents found at the Site that are not listed in the Memorandum are also listed hazardous substances, including but not limited to Toluene and Dibenzofuran.

It is EPA's position that the case you cite as probative, *Center for Biological Diversity v. BP America (In re Oil Spill by the Oil Rig "Deepwater Horizon"),* is an inaccurate understanding of CERCLA and the definition of hazardous substances found in section 101(14) of the Act. The Court seems to confuse the petroleum exclusion and the RCRA exemption for E&P wastes. The EPA was not a party to the lawsuit, and therefore unable to explain the intricacies of CERCLA and its definitions to the Court.

It is EPA's position that we have jurisdiction to remediate the Site, and Chromalloy is liable pursuant to CERCLA Section 107. Please respond within 10 days upon receipt of your client's intent on performing the RI/FS at the Site.

Please feel free to contact me at 214-665-8063 if you have any questions regarding this letter.

Sincerely,

AMY SALINAS

Digitally signed by AMY SALINAS
DN: c=US, o=U.S. Government, ou=USEPA, ou=Staff, cn=AMY SALINAS, dnQualifier=0000008426
Date: 2017.09.11 16:20:33 -05'00'

Amy Salinas
Assistant Regional Counsel